IN THE

Supreme Court of the United States

October Term, 1959

No.

KAARE PETERSON,

Petitioner,

against

SEABOARD MARINE SERVICE CORPORATION and THE STATE INSURANCE FUND,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case April 28, 1959.

Opinions Below

The opinion of the United States District Court, for the Southern District of New York is officially reported in 159 Fed. Supp. 27.

The opinion of the United States Court of Appeals is not yet officially reported and is printed in Appendix "A".

Jurisdiction

The judgment of the United States Court of Appeals was dated and entered April 28, 1959. The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254 (1).

Questions Presented

Which of the interpretations of Sec. 933, sub-sections (f) and (g) of the U. S. Code of the Longshoremen's and Harbor Workers' Act, 44 Stat. 1424, as amended, etc., correctly construed the law, namely, whether by the Deputy Commissioner holding that in view of the full reimbursement out of the petitioner's third party settlement to the employer and its compensation carrier for all compensation and medical payments voluntarily made by them, petitioner's claim for deficiency compensation should be computed *de novo* as done by the Deputy Commissioner and no further credit given to the employer and its carrier except the net amount of the recovery by the petitioner from the third party settlement or the interpretation by the Court below which affirmed the District Court's decision reversing the finding by the Deputy Commissioner and holding to the contrary?

Reasons for Granting the Writ

The Court below interpreted the applicable law in a manner which constitutes a radical departure from the well recognized and uniform holdings followed by Deputy Commissioners over the years and throughout the country.

There is a conflict of decisions between that by the Court below of the following cases:

Voris v. *Gulf Tide Steve. Inc.*, 211 Fed. 2nd;
Anderson v. *Hoage*, 70 Fed. 2nd 773;
Luckenbach S. S. Co. v. *Norton*, 96 Fed. 2nd 764.

Whether the foregoing section should receive the liberal interpretation of the statement or strict interpretation by the District Court and Circuit Court of Appeals.

Pacific Pine Case, 31 Fed. 2nd 152;
Chapman v. *Hoage*, 296 U. S. 526.

Statement of the Case

The Deputy Commissioner found that the petitioner while employed by the Seaboard Marine Service Corporation sustained serious injuries as a result of an industrial accident on January 21, 1950 aboard a vessel afloat in the navigable waters of the United States. His employer and the insurance carrier, the State Insurance Fund, provided medical and hospital services and voluntarily paid compensation for total disability from January 22, 1950 to December 5, 1951 in the sum of $3,410. Medical and hospital bills up to that date amounted to $2,553.87 making a grand total of $5,963.87 paid by the carrier for such compensation and medical payments.

On December 4, 1951, the employee gave due notice to the Deputy Commissioner of his intention to sue a third party tort-feasor responsible for his injuries. The insurance carrier thereupon suspended payments of compensation and filed its lien of $5,963.87 for the payments made to the petitioner for medical care and compensation.

The suit against the third party tort-feasor, Waterman Steamship Co., was settled for $25,000 with the written consent of the carrier, State Insurance Fund. From this amount, attorneys' fees and court costs were deducted in the sum of $9,036.13. The State Insurance Fund was reimbursed in full in the sum of $5,963.87 for its lien covering medical and compensation payments and the balance of $10,000 was paid to the injured employee, the petitioner herein.

Subsequently thereto, the petitioner, contending that he was permanently and totally disabled because of his injuries, commenced proceedings for the resumption of compensation payments pursuant to Section 908(a) of the Act. (See also Sections 933(f) and (g). The carrier, having stipulated to the permanent total disability of the petitioner, a formal order was duly made and filed by the Deputy Commissioner awarding compensation for permanent total disability from January 22, 1950, the date of the accident, to July 6, 1957, the date of the conference, at $35 per week totalling $13,615. The Deputy Commissioner thereupon credited the carrier with the net amount of $10,000 received by the petitioner from his third party settlement leaving a balance of $3,615 payable immediately to the petitioner and directed that payments continue at $35 per week during continuance of total disability.

The State Insurance Fund attacked the order of the Deputy Commissioner and brought an action in the United States District Court for the Southern District of New York for an injunction and recision of the Deputy Commissioner's order contending that, in addition to the $10,000 credit allowed by the Deputy Commissioner, it should also receive credit for the $3,410 representing the voluntary payments of compensation made by it prior to the institution of the third party action, even though it had already been reimbursed in full for the settlement.

After issue was joined the Carrier made a motion for summary judgment which was granted. The petitioner appealed herein to the United States Court of Appeals for the Second Circuit which affirmed the decision.

Argument

The Court below erroneously construed Section 933 subdiv. (f) of the United States Code in Longshoremen's cases, as well as the purpose and intent of this source of legislation.

There is no dispute by the parties as to the facts or to the right of the respondent carrier to reimbursement. But once such reimbursement has been made in full, Sec. 933 (f) confers in clear and unequivocal language the sole right upon the Deputy Commissioner to ascertain the amount of deficiency compensation by directing the employer to pay "* * * as compensation under this act *a sum equal to the excess of the amount which the Commissioner determines* is payable on account of such injury or death *over the amount* recovered against such such third person." The words "over the amount recovered against such third person" obviously refer to the actual amount received by petitioner after deduction of counsel fees and respondent's lien. See *Voris* v. *Gulf Tide Stevedores, Inc.*: 211 Fed. 2nd 549. The section further confers upon the commissioner the sole right to determine the amount of the deficiency compensation "* * * *which the commissioner determines is payable* on account of such injury * * * over the amount recovered against such third person."

The Deputy Commissioner properly took all the facts in consideration including the full reimbursement by the respondent carrier and applied a liberal interpretation of the statute having in mind the purpose and philisophy of this social legislation. *Pacific Pine case*, 31 Fed. 2nd 152 at page 154; *Chapman* v. *Hoage*, 296 U. S. 526 and *Voris* v. *Gulf Tide Stevedores Inc.*, *supra*.

By seeking additional credit of $3,410. the compensation previously paid for which it has been reimbursed, the respondent carrier is seeking in effect double indemnification for the one payment it has made for which concededly it has been reimbursed in full. It is axiomatic that an insurance carrier can only be indemnified once for its loss and risk. *Chapman* v. *Hoage*, *supra*.

Finally the findings of the Deputy Commissioner are presumed correct if his reasoning has been accurately ap-

plied. *Anderson* v. *Hoage*, 70 Fed. 2nd 773; *Luckenbach S. S. Co.* v. *Norton*, 96 Fed. 2nd 764. Thus the Deputy Commissioner concluded that the respondent carrier, having been reimbursed in full for its medical and compensation payments, had not and did not sustain a loss of one penny and computed the compensation *de novo* from the date of the accident to the date of the award and then credited the net amount of the third party recovery by the petitioner thus arriving at the deficiency compensable due.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

LOUIS BLOCH,
Proctor for Petitioner.

APPENDIX

(Opinion of United States Court of Appeals, for the Second Circuit)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 306—October Term, 1958.

(Argued April 9, 1959 Decided April 28, 1959.)

Docket No. 25114

—o—

SEABOARD MARINE SERVICE CORPORATION,
Employer Plaintiff-Appellee,

—and—

THE STATE INSURANCE FUND,
Insurance Carrier Plaintiff-Appellee,

—v.—

ARNOLD J. QUIGLEY, Deputy Commissioner for the 2nd Compensation District of The United States Department of Labor, Bureau of Employees' Compensation,
Defendant-Appellee,

—and—

KAARE PETERSON,
Employee Defendant-Appellant.

—o—

Before:

HINCKS, LUMBARD and WATERMAN, *Circuit Judges.*

Suit by an employer and its insurance carrier, under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. §§901 *et seq.*, to modify an award made by the

Deputy Commissioner of the Department of Labor to Peterson, plaintiff's employee. The District Court for the Southern District of New York, Sugarman, *J.*, granted the plaintiffs' motion for summary judgment and Peterson appeals.

Affirmed.

Louis Bloch, New York, N. Y., *for defendant-appellant.*

Louis Bissell, New York, N. Y. (Charles G. Tierney, General Attorney of The State Insurance Fund, New York, N. Y., on the brief), *for plaintiffs-appellees.*

Per Curiam:

Peterson, having been injured in the course of his employment on January 21, 1950, received compensation from his employer's insurance carrier until December 4, 1951, when he announced his election to sue a third party for damages. The case was settled and out of the settlement the insurance carrier recovered what it already had disbursed for compensation and medical care. Thereafter, Peterson sought and was awarded deficiency compensation from January 22, 1950 to July 6, 1957. Judge Sugarman held that Peterson, having already been compensated for the period from January 22, 1950 to December 4, 1951, was entitled to no further award for that period. He granted summary judgment modifying the Deputy Commissioner's award, to make it run from December 4, 1951.

Upon the opinion below, D. C. S. D. N. Y., February 3, 1958, —— F. Supp. ——.

Affirmed.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of April one thousand nine hundred and fifty-nine.

Present:

HON. CARROLL C. HINCKS,
HON. J. EDWARD LUMBARD,
HON. STERRY R. WATERMAN,
Circuit Judges.

SEABOARD MARINE SERVICE CORPORATION,
Employer-Plaintiff,

and

THE STATE INSURANCE FUND,
Insurance Carrier-Plaintiff,

v.

ARNOLD J. QUIGLEY, Deputy Commissioner for the 2nd Compensation District of the United States Department of Labor, Bureau of Employees' Compensation,
Defendant-Appellant,

and

KAARE PETERSON,
Employee-Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro,
Clerk.